MAD YAACOB ISMAIL

v.

KERAJAAN NEGERI KELANTAN & ANOR AND OTHER APPLICATIONS

HIGH COURT MALAYA, KOTA BHARU
SURIYADI HALIM OMAR J
[ORIGINATING MOTIONS NOS: MT(3) 25-32-2000, MT(3) 25-33-2000, MT(3) 25-34-2000, MT(3) 25-35-2000]
25 FEBRUARY 2001

CONSTITUTIONAL LAW: *Courts - Jurisdiction - Application for writ of habeas corpus to High Court after conviction of heresy by Syariah Court - Whether applicant had apostatised when conviction was made - Whether Syariah Court must confirm apostasy before High Court has jurisdiction over matter - Federal Constitution, art. 121(1A), Enakmen Pentadbiran Mahkamah Syariah 1982, s. 102(1), (2)*

This is an application for a writ of *habeas corpus* by four applicants challenging the jurisdiction of the Syariah Court which had convicted them for heresy when they had confessed to having been having apostatised.

Held:

[1] Under art. 121(1A) of the Federal Constitution, the High Courts in Malaya and Sabah and Sarawak were ousted over matters which fell within the jurisdiction of the Syariah Court.

[2] To be successful in their applications, the applicants must prove that their detentions were unlawful. Having scrutinised the affidavits of the applicants, the court found that the detentions were legal and in accordance with the provisions of the *Enakmen Pentadbiran Mahkamah Syariah 1982*, and pursuant to s. 8(1) and s. 9(1) of the said *Enakmen*, the Syariah Court was a competent court empowered to deal with the matters at hand.

[3] A writ of *habeas corpus* cannot be granted to a person serving sentence imposed by a court of competent jurisdiction. Also, it cannot serve as an appeal from a sentence passed by a competent court.

[4] The declaration of apostasy *per se* is not a sufficient ground in law to accept the applicants as non-Muslims. Section 102(1) of the said *Enakmen* states that no person considered to be of the Islamic religion

may declare that he is not of Islam unless the Syariah Court declares him so and under s. 102(2) of the same *Enakmen* a person is deemed a Muslim unless the Syariah Court confirms as having apostatised.

[5] In view of the above, since the appellants had not been confirmed as non-Muslims by the Syariah Court and since at the material time they were Muslims, they certainly came under the jurisdiction of the Syariah Court.

[Applications dismissed.]

Case(s) referred to:

Dalip Kaur v. Pegawai Polis Daerah, Bukit Mertajam & Anor [1991] 3 CLJ 2768 ***(refd)***

Ex parte Corke [1954] 2 All ER 440 ***(refd)***

Gurdit Singh v. PP [1933] MLJ 224 ***(refd)***

Mohd Shahriman Mohd Khairil v. PP & Anor [1998] 2 CLJ 855 ***(refd)***

Mohamed Habibullah Mahmood v. Faridah Dato' Talib [1993] 1 CLJ 264 ***(refd)***

Ng Siew Pian v. Abd Wahid Abu Hassan, Kadi Daerah Bukit Mertajam & Satu Yang Lain [1993] 1 CLJ 391 ***(refd)***

Norkursiah Baharuddin v. Shahril Lamin & Anor [1997] 1 CLJ Supp 599 ***(refd)***

Ramah Taat v. Laton Malim Sutan [1927] 6 FMSLR 128 ***(refd)***

Re Gurbachan Singh's Application [1967] 1 MLJ 74 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 25

Enakmen Acara Jenayah Syariah No 9/83, s. 132(1)

Enakmen Majlis Agama Islam dan Adat Istiadat Melayu Kelantan 1994, s. 102(1), (2)

Enakmen Pentadbiran Mahkamah Syariah 1982, ss. 8(1), 9(1)

Federal Constitution, arts. 5(2), 121(1A)

Undang-Undang Majlis Agama Islam Kelantan dan Adat Istiadat Melayu Bil 2.66, s. 69

Other source(s) referred to:

Halsbury Laws of England, 3rd edn, vol 11, pp 35-36

Reported by Usha Thiagarajah

JUDGMENT

Suriyadi Halim Omar J:

The brief facts revealed that the applicants had been initially charged and convicted at the Syariah High Court Kelantan for the offence of heresy. The relevant provision under which they were charged was s. 69 of the *Undang-Undang Majlis Agama Islam Kelantan dan Adat Istiadat Melayu*

Bil. 2.66. Each received the sentence of twenty months imprisonment. Appeals were accordingly filed by the applicants but met with scant success, except for the fact that the Religious Court of Appeal (Mahkamah Rayuan Syariah) had varied the sentences. Under this new varied sentence the applicants were each required to furnish a bond of RM5,000, and to be on good subsequent behaviour. Apart from that the applicants were required to appear at the Kadi's Court every month for three years, whereupon they were to repent (melafazkan taubat). Unfortunately, as they had failed to acquiesce to the new conditions, the applicants were thereupon charged with fresh charges (hereinafter referred to as the new charges), culminating in their convictions and imprisonment of three years each.

The facts further revealed that prior to the conviction and sentencing of the applicants under the new charges on 19 November 2000, the applicants had confessed in open court on 12 November 1998 that with effect from 16 August 1998 they had already apostatised. Pursuant to these confessions, the relevant religious department had preferred charges against them through a notice of motion, founded under s. 132(1) of the Enakmen Acara Jenayah Syariah No. 9/83, read together with s. 69 of the *Undang-Undang Majlis Agama Islam dan Adat Istiadat Melayu Kelantan 1966 (Pin. 8/86)*. These apostasy charges are yet to be heard, and not directly relevant to these applications except for the confessions which were the very foundation of the complaints of the applicants, *vis-a-vis* the current applications. Came the fateful day of 19 November 2000 the charging, finding of guilt, convictions and sentencing on the new charges were still proceeded with, even though the presiding judge had already been informed seven days earlier of their renunciation of the religion of Islam, through that said confessions. The applicants filed no appeals as against the outcome of these new charges. They had instead opted for writs of *habeas corpus* before me.

It was quite clear to me that the relevant question to be resolved was whether writs of *habeas corpus* could be issued by the court in the circumstances of the case, in the light of the applicants challenging the jurisdiction of the Syariah High Court judge, whence the latter had already known that they had confessed to having apostatised. To resolve this poser, it was beyond doubt that the Federal Constitution must take centre stage and requiring some discussion (*Mohd Shahriman Mohd Khairil v. Public Prosecutor & Anor* [1998] 2 CLJ 855). Under art. 5(2) of the Federal Constitution is enshrined of the rights of a person not to be deprived of his life or personal liberty, save and in accordance with the law. A High Court judge on receipt of a complaint of being unlawfully detained shall enquire into that complaint and, unless satisfied that the detention is lawful,

order him to be produced before the court and henceforth release him. Under s. 25 of the Courts of Judicature Act 1964 and Chapter XXXVI of the Criminal Procedure Code are promulgated the necessary powers for the judge to deal with the matters at hand.

To reiterate, to be successful in their endeavour before me, the applicants must prove, in a gist, that their detentions were unlawful. To resolve this imperative point I need at the outset too to clarify that on matters connected to religion, a dividing line exists in Malaysia for those who practise and profess Islam and those who do not. Under A 704 of 1988, effective 10 June 1988 art. 121(1A) of the Federal Constitution was promulgated whereby the High Courts in Malaya and Sabah and Sarawak were ousted over matters which fell within the jurisdiction of the Syariah Court. Under List 11-State List (art. 74; 95B(1)(a)), the Constitution delineates the powers of the latter court over persons professing the religion of Islam (*Ramah bte Taat v. Laton Malim Sutan* [1927] 6 FMSLR 128; *Dalip Kaur v. Pegawai Polis Daerah, Bukit Mertajam & Anor* [1991] 3 CLJ 2768; *Mohamed Habibullah bin Mahmood v. Faridah bte Dato' Talib* [1993] 1 CLJ 264; *Ng Siew Pian v. Abd Wahid bin Abu Hassan, Kadi Daerah Bukit Mertajam & Satu Yang Lain* [1993] 1 CLJ 391).

To zero in on the matter at hand I had to decide, *inter alia*, whether the applicant had been incarcerated pursuant to a good order, and from a competent forum or court. In other words I had to make a finding of fact whether their detentions were legal. Having scrutinised the affidavits of the applicants, with particular reference to para. 19, I could not avoid deciding that they had been. I concluded thus as the very court which dealt with them had been set up in accordance with the provisions of *Enakmen Pentadbiran Mahkamah Syariah 1982*. Section 8(1) of the *Enakmen* reads:

> Kebawah Duli Yang Maha Mulia Al-Sultan bolehlah melalui pemberitahu dalam warta menubuhkan:
>
> a) Mahkamah Rayuan Syariah.
>
> b) Mahkamah Tinggi Syariah.
>
> c) Mahkamah Rendah Syariah.
>
> di mana-mana tempat yang difikir patut dan bolehlah menentukan kehendak bidang kuasa Mahkamah-Mahkamah yang demikian.

Section 9(1) of the abovementioned Enakmen provides for the powers of the Syariah High Court judge, and it reads:

> Dalam bidang kuasa jenayahnya, membicarakan mana-mana kesalahan yang dilakukan oleh seseorang Islam dan yang boleh dihukum di bawah Enakmen ini atau mana-mana undang-undang bertulis yang telah diperuntukkan baginya dan bolehlah mengenakan apa-apa hukuman yang telahpun diperintahkan baginya.

With the promulgation of the above provisions it was clear to me that the Syariah Court was a competent court, endowed with the necessary powers to deal with the matters at hand.

It is also trite law that a writ of *habeas corpus* cannot be granted to a person serving sentence passed by a court of competent jurisdiction (*Re Gurbachan Singh's Application* [1967] 1 MLJ 74; *Gurdit Singh v. Public Prosecutor* [1933] MLJ 224). The fact that the applicants never filed any appeal against the outcome of the new charges will not attract the sympathy of any court, as a writ of *habeas corpus* cannot be used as a means of appeal from a sentence passed by a competent court (*Ex parte Corke* [1954] 2 All ER 440). In fact the attempts by the applicants to challenge the validity of another competent court by this technique, ie, by filing this *habeas corpus* action surely must meet the wrath of the court. *Halsbury Laws of England*, 3rd edn, vol 11 at pp. 35 and 36 had occasion to author:

> The writ will not be granted to persons convicted or in execution under legal process including persons in execution of a legal sentence after conviction on indictment in the usual course.
>
> The writ of *habeas corpus* will not be granted where the effect of it would be to review the judgment ... (emphasis mine)

In *Norkursiah bte Baharuddin v. Shahril b Lamin & Anor* [1997] 1 CLJ Supp 599, Hakim KC Vohrah had opined that:

> The High Court could not, in *habeas corpus* application under s. 365 of the Code, review or, question the validity of a subsisting order made by a syariah court which was a court of competent jurisdiction. And in any event, the High Court by virtue of art. 121(1A) of the Constitution had no jurisdiction to question an order made in respect of a matter where the Syariah High Court, a creature of a written law, had jurisdiction given to it under a written law. This court would have to accept the Syariah High Court order as a valid order (emphasis mine).

Be that as it may, according to the affidavits of the applicants, the Syariah High Court was without jurisdiction to deal with them the moment they apostatised effective 16 August 1998. I have dealt with this legal poser in some depth in Originating Summons 24-319, 320, 321, 322 of 2000, but due to necessity, I herewith reproduce a brief resume of the findings. To

avoid any misunderstanding, I need to state that I still stand by my views as stated in the abovementioned originating summons, where I had concluded that the declaration of apostasy *per se*, was insufficient ground from the point of law, to accept them as non-Muslims. The reasons supplied, and needless to say still applicable, are as follows:

> Section 102(1) of the Enakmen Majlis Agama Islam dan Adat Istiadat Melayu Kelantan 1994 in brief reads:
>
> > Tidak seorangpun yang telah diakui beragama Islam boleh mengaku bahawa dia bukan Islam melainkan setelah Mahkamah memberi pengesahan sedemikian.

In brief it provides that no person who is confirmed a Muslim, may admit that he is a non-Muslim unless confirmed by the Syariah court. Under s. 102(2) of the same Enakmen a person is deemed a Muslim until confirmed by the Syariah Court as having apostatised. In the original text it reads:

> Sebelum Mahkamah membuat pengesahannya seseorang itu hendaklah dianggap beragama Islam dan segala perkara yang berkaitan dengan Agama Islam adalah terkena ke atasnya.

On those outputs, the applicants as they had not been confirmed as non-Muslims, and being Muslims still at the material time, certainly fell within the jurisdiction of the Kelantan Syariah High Court.

Based on all the above grounds, I had no hesitation in dismissing the *habeas corpus* applications by the applicants, as I found for a fact that their detention had been pursuant to orders made by a Syariah court, which was a court of competent jurisdiction.